programming, with the changes in programming resulting in the loss of local broadcast services in an affected community[16].

41. SBC submits that any change in market conditions that impairs the ability of WWSB to purchase attractive programs (and thereby reduces the station's audience and revenues) or that materially increases the prices WWSB must pay for attractive programming would significantly impact on the station's ability to serve as Sarasota County's only local television broadcast outlet. It is therefore clear that diversion of programming funds from news and public affairs to entertainment programs could only serve to defeat the philosophy of localism Congress sought to foster through Section 307(b).[17]

D. TELEVISION VIEWERS IN SMALLER OVERSHADOWED MARKETS WILL LOSE ACCESS TO PROGRAMMING

42. The expansion of non-network program exclusivity arrangements must inevitably impact significant numbers of viewers whose only access to television programming is from overshadowed stations[18]. Television stations have always had

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[16]Furthermore, as its audience declined, WWSB would be less attractive to local advertiser, who would be forced to resort to using more expensive (i.e., less economical) Tampa stations or withdraw from advertising on television.

[17]Ironically, it is this very philosophy of localism that prevents WWSB from relocating its facilities to Tampa and competing with the Tampa stations on an equal basis.

[18]The number of overshadowed UHF television allotments is quite substantial. Examination of just the first twenty television markets reveals that the stations in these large markets overshadow at least 77 UHF channels located in 55

the ability to purchase exclusive rights to broadcast programs _within_ their own market[19]. If an overshadowing station were able to obtain exclusive broadcast rights to a program throughout its service area, it could effectively cover both its own market and other nearby markets as well, denying overshadowed stations the right to broadcast within their home markets. However, in many markets the overshadowed station does not cover the entire smaller market. In these cases, viewers would be denied over-the-air access to these programs.

E. THE _NOTICE_ MISCOMPREHENDS THE NATURE AND EXTENT OF MARKET INTERVENTION BY THE 35 MILE RULE

43. The _Notice_ also mischaracterizes the type of market intervention embodied in the 35 Mile Rule. The rule does not limit the contractual freedom of program suppliers. It leaves suppliers free to sell their programs to anyone they choose. The rule acts solely to limit the ability of large market stations to deprive small market stations of access to popular programs. It is a check on the market power of large market stations, not a limitation on programmers' freedom of contract.

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communities. _See_ "UHF Allotments Overshadowed by Stations in the Top 20 Markets" appended hereto as Exhibit 9.

[19]Exclusivity rights have not always been available vis-a-vis non-broadcast performance. _See_ discussion of the Syndex Rule.

F. THE 35 MILE RULE IS NECESSARY TO AVOID AD HOC DECISIONS ON PROGRAM EXCLUSIVITY ARRANGEMENTS

44. The Notice's speculation that a general rule governing non-network territorial exclusivity may be impractical is simply mystifying. Notice at paras. 67 and 68. The Commission has administered a rule on this subject for the last fifteen years. The rule governs countless contracts entered into by hundreds of stations in hundreds of markets. The Notice does not identify a single problem the Commission has encountered in administering its rule. Surely the Commission does not intend to regulate the thousands of contracts involving territorial exclusivity arrangements on a case-by-case basis. If the point of the Notice is that a general rule is less practical than doing nothing at all, this is a view inconsistent with the economic realities and historical experience of UHF broadcasting in overshadowed markets. See Exhibit 1. Indeed it is a view tantamount to abdication of the Commission's duty to serve the public interest.

G. ANTITRUST LAWS ARE NEITHER APPROPRIATE NOR SUFFICIENT REMEDIES FOR POTENTIAL INJURIES CAUSED BY REMOVAL OF THE 35 MILE RULE

45. The Notice suggests that the adverse economic effects of eliminating the 35 Mile Rule may be adequately remedied by the antitrust laws. However, the diminished ability of smaller stations to maintain a viable presence and

offer local programming, local news, and local public affairs programs -- goals which the Commission has historically fostered -- does not necessarily rise to the level of an illegal vertical restraint. In the context of the highly regulated broadcasting market, in which entry is severely limited and a station's market power is defined by the FCC, there is a distinct need for regulation to prevent the abuses inherent in the market. Forcing small local stations in overshadowed markets to finance expensive antitrust litigation to protect themselves, as an alternative to the certainty provided by the 35 Mile Rule, simply makes no sense.

IV. THE BENEFITS ANTICIPATED BY THE NOTICE ARE UNLIKELY TO OCCUR

46. Finally, the Notice asserts that several benefits will follow removal of the 35 Mile Rule. First, it claims that with less regulation, the market for programming will function more effectively, and to the extent that the new market result more closely approximates a competitive outcome, consumer welfare will be enhanced. Second, it asserts that because of more efficient functioning of the market, suppliers will face an improved incentive system that will cause them to expand the supply of programming and produce a mix of programming that more closely matches consumer preferences.

A. REMOVAL OF THE 35 MILE RULE WILL NOT NECESSARILY LEAD TO PUBLIC INTEREST BENEFITS

47. As demonstrated above, the television broadcasting market has little in common with the perfectly competitive

market posited by economic theory. Market imperfections are caused in this market by three influences: (a) physical limitations on television transmission and reception, (b) economic interrelations between television and other markets, and (c) government regulation that evolved because the television market failed to produce outcomes that maximized the public interest.

48. In a market so rife with imperfection, it would not be surprising to find that some imperfections operated to improve the functioning of the market by cancelling out in whole or in part the undesirable influence of other imperfections. In such a market, it does not follow that removal of any particular imperfection will lead unambiguously to a more competitive, more efficient market outcome.

49. However, even if it were possible to conclude that elimination of the 35 Mile Rule unambiguously leads to a solution more closely resembling the outcome of a competitive market, the Commission would not be justified in abolishing the Rule. The Commission's function is not limited to examining what economists consider the benefits of a regulatory action. The Commission is charged with promoting the public interest. Public interest includes important factors outside the realm of economic theory, such as the fair and equitable distribution of television service among communities. Balancing these factors against the potential gains in efficiency would not justify

eliminating the rule, even if the gains were not so speculative.

B. THE NOTICE'S ASSUMPTION THAT ELIMINATION OF THE 35 MILE RULE WILL LEAD TO AN INCREASE IN THE SUPPLY OF PROGRAMMING IS NOT WELL FOUNDED

50. The Notice assumes that the supply of programming will be improved by eliminating the 35 Mile Rule. In the Notice's view, this would be consistent with the Commission's policies of promoting program growth and diversity. However, elimination of the 35 Mile Rule must cause a significant increase in the amount of revenues flowing to program producers if this favorable outcome is ever to occur. This is unlikely for two reasons.

51. First, as previously stated, empirical observation shows that exclusivity, when available, is the norm rather than the exception, and no significant increase in price appears to be paid for the right to exclusivity. Second, if the theory does hold as the Notice suggests, exclusivity should occur only when the incremental amount which the overshadowing broadcaster is willing to pay for exclusivity exceeds the amount that the overshadowed broadcaster is willing to pay for the program. This "occasional inability of some stations to obtain specific programs" (Notice at p.11) should result in only a small reallocation of resources. It is hard to see how this will result in any significant improvements in the allocation of resources to program production.

V. CONCLUSION

52. The 35 Mile Rule was instituted to ensure the maximum amount of competition in television broadcasting and to preserve local broadcast service in overshadowed markets. Both of these goals are consistent with the Commission's responsibility as stated in the Notice (at para. 5) to "promote efficiency and consumer welfare consistent with the public interest." The Commission further notes that its aims are best met "by ensuring to the extent possible: (1) that its regulations foster a level playing field among the various competitors...and (2) that freedom of contract and thus property rights, are unimpeded by the Commission's regulation or deregulation of the industries."

53. The 35 Mile Rule promotes these important goals by striking a reasonable balance to ensure that inherent technical, regulatory and economic characteristics of the market do not cause total domination of smaller stations serving smaller markets by larger stations serving larger markets. Therefore, the 35 Mile Rule in effect maintains as level a playing field as possible between competing broadcast stations, while minimizing regulatory intrusion on individual freedom of contract.

54. The limitation introduced by the 35 Mile Rule involves at most a minor intrusion to an already very imperfect market. This regulatory intrusion has a specific purpose: to enhance the public interest in local television service by

ensuring that local broadcast outlets remain viable throughout the country. If economic efficiency, narrowly defined, and economic forces transmitted through the marketplace conflict with the attainment of the Commission's local broadcast objectives, then the Commission is required to act to preserve local service. <u>See</u> Section 307(b) of the Communications Act. For these very important reasons, the Commission should not tamper with the 35 Mile Rule.

Respectfully submitted,

SOUTHERN BROADCAST CORPORATION
OF SARASOTA

By: ______________________
For Leibowitz & Spencer
and Howrey & Simon,
Its Counsel

July 21, 1987

STATEMENT OF DR. WILLIAM O. KERR REGARDING AMENDMENT OF PARTS 73 AND 76 OF THE COMMISSION'S RULES RELATING TO PROGRAM EXCLUSIVITY IN THE CABLE AND BROADCAST INDUSTRIES

I. INTRODUCTION

1. I am Dr. William O. Kerr. I am the Senior Economist at Washington Economic Research Consultants, located at 1730 Pennsylvania Avenue, N.W., Washington, D.C. 20006. I have a Ph.D. in Economics from the New School for Social Research and have taught economics at the graduate and undergraduate level. I have more than ten years experience consulting with government and private sector clients on issues involving economics and public policy and especially dealing with the economics of government regulation. In particular I have consulted for a number of clients on various economic features of the communications and broadcasting industries.

2. I was retained by the law firm of Liebowitz and Spencer to comment upon the above referenced proposed amendments to rules of the Federal Communications Commission. The scope of my comments is limited to the Non-Network Territorial Exclusivity Rule ("the 35 Mile Rule").

3. My comments and analyses are based upon a review of the Commission's Notice of Inquiry and Notice of Proposed Rulemaking, FCC 87-65, released April 23, 1987 (hereinafter "Notice"). In addition, I reviewed various materials produced by the Commission to Liebowitz and Spencer pursuant to a Freedom of Information Act request in June, 1987. I have also reviewed

various published materials and interviewed a number of persons knowledgeable in the television broadcast and the video programming industries.

4. Based upon my analysis of these materials I conclude that the economic justification for removing or modifying the 35 Mile Rule, as proposed, is not sufficiently strong to overcome the economic and public policy risks likely to be produced by the regulatory action. For reasons discussed below I do not believe that the public benefits envisioned by the Commission will occur if the 35 Mile Rule is changed.

5. On the basis of the documents I have seen, I conclude for several reasons that the Commission's proposal with regard to the 35 Mile Rule is not grounded on a sound theoretical analysis. I also believe that the facts and realities of the two relevant markets involved would not, if analyzed, support the Commission's beliefs.

6. First, simultaneously with the proposed changes in the 35 Mile Rule, the Commission is proposing other more sweeping changes in exclusivity rules. The Commission proposes to implement a new rule allowing broadcast stations to purchase exclusivity rights for distribution of syndicated programming ("the Syndex Rule") and is strengthening broadcasters' ability to maintain exclusivity of network programming ("the Non-Duplication Rule"). The public benefits which the Commission believes will flow from these regulatory actions will clearly and almost exclusively result from changes in the Syndex and Non-Duplication Rules and not from elimination of the 35 Mile

Rule. The analyses on which the Commission's beliefs are based simply do not apply to the proposed elimination of the 35 Mile Rule.

7. Second, the Commission is overly optimistic, given the highly regulated television broadcasting market, in concluding that no negative effects will arise upon elimination of the 35 Mile Rule. Market forces in this market are not strong enough to substitute for affirmative regulations that ensure the continued viability of competing entities.

8. Therefore, the benefits foreseen by the Commission from proposed changes to the 35 Mile Rule are uncertain at best, have not been demonstrated, and are unlikely to occur. The Commission's conclusion that elimination of the 35 Mile Rule will lead to a net increase in public welfare is incorrectly premised upon a freely competitive broadcast market. But because the television broadcasting market is inherently non-competitive, it is impossible to conclude that any increase in public welfare will result from elimination or modification of the 35 Mile Rule.

9. In opposition to the Commission's belief, there are very real possibilities for losses in public welfare. Viewers in many areas are likely to find their access to desirable programming seriously reduced. Also, local communities in overshadowed television markets could see the service provided by local broadcast outlets seriously eroded. The 35 Mile Rule has been -- and continues to be -- a necessary equalizing factor in the broadcast market which, by virtue of technical,

regulatory and economic forces, will never be a "level playing field."

II. BACKGROUND: THE PURPOSE OF THE 35 MILE RULE

10. Television stations have long had the ability to purchase exclusive rights to broadcast programs within their own markets.1/ In some areas, large stations are able to "overshadow" stations in neighboring markets; that is, to broadcast into all or a part of the neighboring station's service area. If an overshadowing station were to be able to obtain exclusive broadcasting rights to a program throughout its service area, it could effectively cover both its own market and other nearby markets as well, thereby denying overshadowed stations the right to broadcast programming for use within their home markets.

11. The FCC as part of its charge to enhance and protect the public interest has established an allocation scheme for broadcast channels that locates each station geographically and, among other things set the technical contours of its program reach. The problem of overshadowing clearly presents a source of conflict with the Commission's allocation responsibility.

12. Fear of such problems gave rise to the 35 Mile Rule. The economics of television broadcasting give stations in larger markets, particularly VHF stations, a distinct competitive

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1/ Exclusivity rights have not always been available vis-a-vis non-broadcast performance. See discussion of the Syndex Rule below.

advantage over stations serving smaller markets, and particularly UHF stations within those markets. The larger audiences available in overshadowing markets allow stations in these markets to outbid stations in smaller markets when competing for rights to video programming.

13. The 35 Mile Rule was instituted because the untrammeled use of exclusive broadcasting rights could result in two negative public welfare effects in overshadowed markets; First, there are significant numbers of viewers whose only source of broadcast coverage was overshadowed stations. If stations in overshadowing markets were able to obtain exclusivity, then these viewers would be denied access to desirable programming.

14. Second, to the extent that overshadowing stations could obtain exclusivity for the most desirable programs, overshadowed stations would be forced to purchase lower quality programming to fill their broadcast schedule. As a result these stations would face smaller audiences than otherwise, earn lower advertising revenues and thus be less able to provide such services as public affairs programming and news coverage to the local community. In addition, advertisers serving the overshadowed community would have less access to local TV audiences and would be placed at a disadvantage relative to competing businesses located in the nearby overshadowing market.

15. With the 35 Mile Rule the Commission was able to prevent these potential problems and to ensure the maximum amount of viewer choice across the country and to preserve local broadcast service in overshadowed markets. Both of these goals are

consistent with the Commission's responsibility as stated in the Notice (at ¶ 5) to "promote efficiency and consumer welfare consistent with the public interest." The 35 Mile Rule promotes efficiency and consumer welfare consistent with the public interest within the television broadcast market by striking a reasonable balance to ensure that technical, regulatory and economic characteristics of the market do not allow total domination of smaller stations serving smaller markets by larger stations in larger markets.

16. As an economist I make no claim to estimate economic costs and benefits resulting from the loss of viewer choice or from the loss to local communities of a level of broadcast service. I merely note that the probability that these losses will occur is quite high given the economic incentives and organization observed in the television broadcasting industry. I also note that these losses have been recognized and must be assessed and weighed against the presumed economic benefits of removing the rule.

III. THE JUSTIFICATION FOR THE PROPOSED SYNDEX AND NON-DUPLICATION RULE CHANGES DOES NOT APPLY TO THE 35 MILE RULE

17. The Commission has undertaken consideration of the proposal to eliminate or modify the 35 Mile Rule as part of its continuing move toward deregulation of the nation's communications industries. As noted, Commission is simultaneously reconsidering the Syndicated Exclusivity and the Network Non-Duplication Rules. The Commission proposes to

change all of these rules to allow broadcast stations and program suppliers to bargain for exclusivity of the rights of broadcast stations and video programming, both network and syndication.

18. In the Commission's view all three rules have their primary effect on the video programming market, where television broadcasters compete with other video exhibitors (e.g., cable operators and videocassette distributors) as buyers in the purchase of a critical input -- television programs. With regard to the Syndex and Non-Duplication Rules, the Commission is correct. The only effect of modifying those rules as proposed will be to remove a regulatory constraint that affects one group of competitors (TV broadcasters) in an otherwise relatively competitive market. In so doing, the Commission believes it will contribute to a "level playing field" in that market.

19. However, the Commission incorrectly follows the same reasoning with regard to the 35 Mile Rule. The primary effects of that rule are not felt in the input market for video programming. (In fact, we would argue and believe that empirical research would show the likely effects of elimination of the rule on that market would be very small.) Instead the major purpose of the rule's existence, and its major effect, is ensuring the proper functioning of markets for television broadcasting throughout the country.

20. The Commission fails to take into account the unique technical, regulatory and economic characteristics of the

television broadcasting market. In this market the 35 Mile Rule has some very important positive effects. Competition within television broadcasting involves similar, regulated entities while the Syndex and Non-Duplication Rules deal exclusively with competition in input markets between regulated and non-regulated entities. Elimination of the Syndex and Non-Duplication Rules may, as the Commission believes, improve the functioning of the marketplace by removing an impediment from a group of regulated competitors, enabling them to compete more effectively against unregulated competitors. However, elimination of the 35 Mile Rule has no such equalizing effect.

21. Within the highly regulated, and technologically and economically constrained television broadcast industry operation of the 35 Mile Rule ensures that imperfections created in the market by a diverse set of outside forces do not improperly destroy the viability of broadcast stations whose existence is important to public welfare. The removal of the Rule will not make the playing field more level but will free inherently stronger, but not necessarily more efficient competitors, to drive out otherwise viable stations.

22. It is not clear that the Commission has given sufficient attention to the problems involved in changing the 35 Mile Rule. The Commission has apparently expended much effort in consideration of the Syndex and Network Non-Duplication Rules and concluded that strengthening the ability of broadcasters to negotiate exclusivity provisions will enhance competition between the various exhibitors of video programming. The

factors raised here and in following sections are important, and studies of these factors should be undertaken by the Commission prior to undertaking any modifications of the 35 Mile Rule. Such study will, I am confident, reveal the likelihood that removal of the 35 Mile Rule will pose problems for viewers and local communities will outweight any imaginable economic benefits that could be gained.

IV. TECHNICAL, ECONOMIC AND REGULATORY FACTORS PREVENT THE TELEVISION BROADCASTING MARKET FROM OPERATING TO PRODUCE SOCIALLY OPTIMAL RESULTS

23. The market most affected by the 35 Mile Rule is that for television broadcasting. In this market physical limitations such as broadcast reach, the density of population in particular geographic areas, the inherent differences between UHF and VHF broadcast patterns and other factors all operate to limit the competitiveness of the market and the viability of individual stations. Importantly for the working of the market, the particular set of these factors that faces any station is generally beyond the control of the station's management. Therefore, price incentives that are efficiency enhancing in other markets may not lead to desired outcomes in television broadcasting.

24. Economic factors too contribute to the inability of the television broadcasting market to function efficiently. The nature of competition in this market involves stations primarily competing to gain consumers or viewers. These consumers do not

reveal their preferences by spending on the station's products as would be the case in other industries but by watching at no cost the station's program offerings. The way this competition plays out with regard to advertising sales and purchases of programming is complex. However, the important point to note is that this market could not be adequately described by the model of a standard economic market, nor would the results of an analysis based upon the standard model lead to accurate predictions of consumer or producer behavior.

25. These technological and economic factors interact in complex ways and this interraction further distorts the marketplace. For example, there are physical limitations on the number and type of signals that can effectively be received in a particular geographical area. These limitations affect the economic efficiency of the market by enforcing limits on entry.

26. Finally, primarily because of these economic and technological imperfections in the market, a complex system of government regulations has evolved. This system is designed to ensure that the public resource represented by the airwaves is used best to further public welfare, and in part to attain through regulatory action the efficiency that in other markets derives from free competition.

27. For example, to illustrate the workings of economic forces in the TV broadcast market consider a UHF station in competition with a VHF station. Technical and cost factors determine that in general a UHF station cannot serve a broadcast area as large as can be served by a VHF station. The UHF station could not in

the face of market incentives to expand its audience simply invest in a new plant and equipment and become a more successful competitor, as would be true with competitors in another industry. Instead, the UHF station would be barred by the existing allocation system and by such things as market boundaries and interference rules, power limits and broadcast tower height restrictions, from expanding.

28. Similarly, with overshadowed stations, the efficient competitive response required of an overshadowed station competing with an overshadowing station would be to invest and grow into the other's larger market. That avenue, however, is not open to broadcast stations under current regulations. Therefore the only option for an affected station if the 35 Mile Rule were not in place would be to accept defeat, resulting in the loss of local broadcast services in an affected community.

29. A broadcast station's competitive position as a seller of advertising time is dependent directly on the size of the audience it can attract. Because the size of a station's audience is dependent both on the regulatory and technical characteristics faced by the station and by the quality of the programming the station is able to acquire, success as both a buyer and seller are inextricably related.

30. Thus the technological and regulatory infrastructure of television broadcasting is actually more important in determining the level and type of competition that exists in the industry, than market forces. Indeed, the way that market forces operate in the industry may, when combined with its

unique technical and regulatory characteristics, result in outcomes contradictory to standard economic theory.

31. Legislators and regulators, in particular the Commission, have recognized the limitations of market forces to provide maximum social benefits from the operation of the broadcasting system. However, the Commission has recognized that wherever possible the free working of market prices should be used in place of active regulation to determine the organization of the industry. Within individual geographic markets it is generally accepted that the inherent inequalities conferred by licensing rules, the laws of physics and the needs of advertisers, program suppliers and broadcasters and the public can be allowed to work. Exclusivity within such markets would not preclude any viewing choices to consumers or impair a community's ability to receive local services. When, however, there is a conflict between the public interest in maintaining broadcast services in local communities and the right of the public to free access to airwaves and the results that would occur with market forces acting in the absence of regulation, then the Commission has acted to remedy the problem. The 35 Mile Rule is such a case. Without the 35 Mile Rule, stations in smaller markets in close proximity to larger markets face the very real possibility that, no matter how efficient they are as competitors, they will be driven into serious financial difficulty.

V. BECAUSE OF THE LIMITATIONS INHERENT IN THE TELEVISION BROADCASTING MARKET ELIMINATION OF THE 35 MILE RULE WOULD CAUSE SIGNIFICANT NEGATIVE PUBLIC WELFARE EFFECTS

32. While recognizing the fears of negative consequences that led to the imposition of the 35 Mile Rule, the Commission assumes that deregulation will result in only minimal negative effects to the public, overshadowed stations, and to communities served by those stations. In particular, the Commission presumes that economic factors will prevent the purchase of exclusivity by overshadowing stations if significant numbers of viewers would lose access to programming as a result. Moreover, in cases where exclusivity would be purchased, the Commission assumes that the excluded stations will not suffer because of the abundance of equivalent programming available.

A. The Commission Ignores the Negative Effects of Elimination of the Rule

33. The Commission asserts (at ¶ 62.a): "that competitive market forces will better protect the public interest in territorial exclusivity than will a rigid rule defining the limits of exclusivity." They believe that stations would not, in the absence of the Rule "bargain for any more exclusivity than they believe is worthwhile. Nor would they be expected to bargain for programs that they do not intend to use."

34. However, as demonstrated above, the television broadcast market is not a competitive one. The Department of Justice in its Vertical Restraints Guidelines (Jan. 23, 1985) recognizes

that vertical restraints (like exclusivity contracts) that are benign in competitive markets may have very different and pernicious effects in industries where entry is restricted or limited by regulation. In such markets the competitive forces will not work in place of a regulatory limitation to protect the public interest.

B. The Commission Insists That Alternative Programming Will Be Available to Overshadowed Stations

35. The Commission states (at ¶ 66) that there is now a substantial amount of quality programming available, and that "In view of this fact it seems highly unlikely that the occasional inability of some stations to obtain specific programs would prevent those stations from obtaining good alternative programming and furnishing service to the public."

36. The Commission does not appear, however, to have done any more than count the number of titles available today in syndication when evaluating this complex market. Such an analysis is not adequate to evaluate whether a sufficient supply of alternate programming is available to protect the viability of overshadowed stations.

37. From the point of view of a broadcast station, a unit of video programming is only an effective substitute for another if it will generate an equivalent amount of advertising revenue net of program costs. The primary determinant of the net revenue available from a program is the program's ratings. Even a cursory analysis of the audience ratings of syndicated

programs shows the tremendous variation -- and therefore lack of substitutability -- between individual programs.

38. The June 8, 1987 issue of Broadcasting (at p. 56) shows recent ratings for the top fifteen syndicated shows. Review of this list illustrates the vast differences a station would face if forced to settle for carrying a second choice program were its first choice to be preempted by an exercise of exclusivity rights by an overshadowing station. Simple calculations show that if a station were forced to drop the number one program "Wheel of Fortune" in favor of the number two, "Jeopardy", it would suffer a ratings drop of 19%.

39. In fact, overshadowed stations typically face competition not from one station, but from a number of stations in overshadowing markets and each of the overshadowing stations must fill a number of time slots with desireable programming. Therefore, if the 35 Mile Rule were eliminated, overshadowed stations are not even likely to have the option of taking on a second choice program. Instead, they would be relegated to a third, fourth or even lesser choice. If for example an overshadowed station lost "Wheel of Fortune" and were forced to accept, instead, the number four program "People's Court", it would suffer a drop of more than 46% in its ratings (using again the current ratings from Broadcasting).

40. The financial viability of a station would obviously be severely affected if its programming options were to become as constrained as is shown in the example. Therefore, it is apparent that the optimism the Commission expresses concerning

the ability of overshadowed stations to obtain adequate substitute programming in the face of overshadowing exclusivity is misplaced.

C. The Commission Ignores The Possibility That Viewers Limited to Overshadowed Markets Will Lose Access to Programming

41. There exist a number of markets in which there are viewers whose only access to broadcast programming is from a station that would be overshadowed. Without the 35 Mile Rule, exclusivity will limit the programming available to the overshadowed station and these viewers will lose access to desirable programming. The Commission's assumption to the contrary is based entirely on theoretical analysis which, as shown, is of questionable application to this market. Further, the Commission has made no attempt to find empirical support for its assumption.

42. The Commission has not conducted the research necessary to determine the extent of the potential problem. It has not examined TV markets around the country to determine how many viewers are served by potentially overshadowed stations, nor identified the number of such stations that will be at risk. Before the Commission undertakes to modify the current 35 Mile Rule studies should be done that will answer these crucial questions about the potential negative effects of market failure in the television broadcasting industry.

VI. THE BENEFITS FORSEEN BY THE COMMISSION AS A RESULT OF REMOVING THE 35 MILE RULE ARE UNLIKELY TO OCCUR.

43. The Commission asserts that several benefits will follow removal of the 35 Mile Rule. First, the Commission claims that with less regulation, the market for programming will function more effectively, and to the extent that the new market result more closely approximates a competitive outcome, consumer welfare will be enhanced. Second, the Commission asserts that because of more efficient functioning of the market, suppliers will face an improved incentive system that will cause them to expand the supply of programming and to produce a mix of programming that more closely matches consumer preferences.

44. As demonstrated above, the television broadcasting market has little in common with the perfectly competitive market posited by economic theory. Market imperfections are caused in this market by three influences: physical limitations, economic interrelations between this and other markets, and government regulation that has evolved to deal with these other influences and because the market failed to produce outcomes that maximized the public welfare.

45. In a market so rife with imperfections it would not be suprising to find that that some imperfections operated to improve the functioning of the market by cancelling out in whole or in part the undesirable influence of other imperfections. In such a market, it does not follow that removal of any particular imperfection will lead unambiguously to a more competitive, more efficient market outcome.